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IN THE

Supreme Court of the United States

October Term, 1964
No. 732

BERNARD REICH and SYLVIA REICH, Depositors and members of the BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION individually and in behalf of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION and the other members of said association similarly situated,

Petitioners,

vs.

EUGENE WEBB, JR., MARGUERITE WEBB, RICHARDS MATTHEWS, JR., ROBERT RUFI, EUGENE C. JONES, LYTTON FINANCIAL CORPORATION, BART LYTTON, BETH LYTTON, THOMAS W. CLARKE, DR. SAMUEL J. SILLS, GLENN WILSON, H. P. BRAMAN, and FEDERAL HOME LOAN BANK BOARD,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered in the above-entitled cause on August 18, 1964.

Citations to Opinions Below.

The opinion of the United States District Court for the Southern District of California [R. 267-269] is reported at 33 F. R. D. 292.

The opinion of the Court of Appeals for the Ninth Circuit [R. 419-428] is reported at 336 F. 2d 153 and is printed in Appendix B hereto.

Jurisdiction.

Petitioners, Bernard Reich and Sylvia Reich, filed a Motion to Intervene under Rule 24 of the Federal Rules of Civil Procedure [R. 112-146] in an action entitled "Beverly Hills Federal Savings and Loan Associations. Federal Hon Loan Bank Board," No. 62-305-K which action had been theretofore filed in the United States District Court, Southern District, Central Division [R. 2-4, Complaint and R. 92-110, Amended and Supplemental Complaint]. Jurisdiction as respects the original Complaint and the Amended And Supplemental Complaint in No. 62-305-K was alleged under Section 5(d)(1) of the Home Owners Loan Act of 1933, 68 Stat. 590, 12 U. S. C. Section 1464(d)(1) and the Federal Declaratory Judgments Act, 62 Stat. 964, 28 U. S. C. Sections 2201, 2202 [R. 2 and 92]. Petitioners' Motion to Intervene under Rule 24 of the Federal Rules of Civil Procedure was denied [R. 267-269; 365, 380, 326].

Petitioners took an appeal to the Court of Appeals for the Ninth Circuit and that Court affirmed the decision and order of the Trial Court on August 18, 1964 [R. 419-428]. The time for filing this Petition for Writ of Certiorari was extended on November 14, 1964 by order of Mr. Justice Douglas to and including December 1, 1964.

This Court has jurisdiction of this Petition pursuant to 28 U. S. C., Section 1254(1).

Questions Presented.

1. Do Petititoners, depositor-owners of a mutual federal savings and loan association, who are inadequately represented by their association's adverse position as respects the liability of former directors and officers thereof to the association and its members for breach of fiduciary duty, and who may be bound by a judgment in a civil action between the association and those former officers and directors, have a right to intervene in that action under Rule 24(a) of the Federal Rules of Civil Procedure despite the presence in that action of the Federal Home Bank Board and the assertion by the Board therein of petitioners' claims.

2. Does Section 5(d)(1) of the Home Owners Loan Act of 1933, 12 U. S. C. Section 1464(d)(1) or any regulation adopted by the Federal Home Loan Bank Board pursuant thereto, give a cause of action for a money judgment against former directors and officers of a federal savings and loan association to the Federal Home Loan Bank Board with respect to the sale of control of the association including proxies and directorships for private profit by those officers and directors, which sale is alleged to have violated the common law fiduciary obligations of directors or officers to the association and its members.

3. When petitioners, depositor-owners of a federal savings and loan association have a derivative or direct right to assert a private claim for money judgment

against former directors and officers of that association who sold proxies and directorships for private profit, and petitioners seek to intervene in a suit between the association and those fiduciaries to preserve that private claim for the association and themselves because the association wilfully asserts a position adverse to that claim, does an attempt by the Federal Home Loan Bank Board in that same lawsuit to enforce petitioners' private claim, which claim the Board does not own and which it cannot enforce because it lacks subject matter jurisdiction over private obligations derived from common law fiduciary duties, constitute adequate representation of petitioners' interest so as to bar petitioners' intervention under F. R. C. P. Rule 24(a).

4. When depositors in a federal savings and loan association seek to intervene in a suit which will adjudicate as between the association and former directors and officers thereof, the liability of those fiduciaries to the association or its members for the sale of proxies and directorships of the association for their private profit, which adjudication will be *res judicata* insofar as the petitioners are concerned, may a federal court deny such intervention as a matter of right where

(a) Petitioners' interest is conceded to be inadequately represented by the association because the association positively asserts that the fiduciaries are not liable;

(b) Petitioners' interests are inadequately represented by the presence in the litigation of the Federal Home Loan Bank Board because the Board has no jurisdiction against those fiduciaries to obtain a judgment on that cause of action.

5. Do the provisions of Sections 3 and 4 of the Administrative Procedure Act, 5 U. S. C. Sections 1002(a), 1003(a) which require publication in the Federal Register of all agency substantive rules, and which regulates agency rule making power, and Sections 5 and 7 of the Federal Register Act, 44 U. S. C. Sections 305(a), 307 apply to the Federal Home Loan Bank Board's enforcement in its own name of obligations derived from the common law so that in the absence of such publication the Board has no power to assert or enforce such a common law obligation.

6. If an agency subject to the provisions of the Administrative Procedure Act and the Federal Register Act fails to publish in the Federal Register, as its own regulation, common law rules of substantive liability applicable against private parties, does that agency have the power to obtain a money judgment against those parties based upon such common law rules of liability.

Statutes Involved.

The statutory provisions involved are Rule 24(a) of the Federal Rules of Civil Procedure; Section 5(a) of the Home Owners Loan Act of 1933, 48 Stat. 132, 12 U. S. C. Section 1464(a); Act of August 2, 1954, Section 503(2), 68 Stats. 622, 634, 12 U. S. C., Section 1464(d)(1); Code of Federal Regulations, Title 12, Chapter V, Sub-chapter C, Section 542.3; Sections 3 and 4 of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. Section 1002(a) and 5 U. S. C. Section 1003(a); and Section 5 and Section 7 of the Federal Register Act, 49 Stats. 501 and 502, 44 U. S. C., Section 305(a) and 307. They are printed in Appendix A *infra*, pages 1 through 8.

Statement.

The facts are undisputed. Petitioners are depositors and members of the Beverly Hills Federal Savings and Loan Association. They have challenged the transfer of controlling interest in the Association from a combine headed by Eugene and Marguerite Webb (the Webb group) to one headed by Bart and Beth Lytton (the Lytton group). Petitioners allege that the Webb group has personally profited in connection with the transfer of proxies, directorships and control of the Association to the Lytton group; their theory is that these personal profits derived from "sale of office" and "sale of control" and as such belong to the entire Association because of an alleged breach of fiduciary duty. They contend that they, as depositors and members of the Association, may assert the claim on its behalf in a derivative action.

The present dispute arose when the Federal Home Loan Bank Board (Bank Board), a body charged by Congress with the supervision and regulation of federal savings and loan associations, instituted administrative proceedings challenging the same transactions attacked by appellants. These proceedings were terminated when the Association filed a suit against the Bank Board, pursuant to § 5(d)(1) of the Home Owner's Loan Act of 1933, as amended [12 U.S.C. § 1464(d)(1)], to have the validity of the challenged transaction judicially determined and to obtain an injunction staying further Bank Board proceedings. The Association later amended its complaint, impleading members of the Webb and Lytton groups.

At this juncture, Petitioner moved to intervene in the action as parties plaintiff under Rule 24(a) F.R. Civ.

P.[1] They urged that their interests as depositors in the Association would not be adequately represented by the Association because of alleged domination by the Lytton group. They further asserted that the Bank Board could not adequately represent them for the reason that it lacked power to enforce the fiduciary obligations of the Association directors and officers by court action. In either event they claimed they would or might be bound by the result. As an independent ground supporting intervention as a matter of right, petitioners contended they might be adversely affected by a distribution or other disposition of property, subject to the control or disposition of the court. The Association, the Webb group, the Lytton group and the Bank Board all opposed the proposed intervention. Following a hearing, petitioners motion was denied but they were granted leave to file briefs as *amicus curiae*.

The district court rested its decision[2] on a determination that the Bank Board had power to adequately represent petitioners. Alternative and independent bases for this power were found: (1) In Congressional authorization [12 U.S.C. § 1464(d)(1) and (2)]; (2) inherent in the Bank Board by virtue of the doctrine of

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[1]Insofar as relied upon by petitioners, Rule 24 provides:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof. As amended Dec. 27, 1946, eff. March 19, 1948."

[2]Beverly Hills Federal Savings and Loan Association v. Federal Home Loan Bank Board, 33 F.R.D. 292 (D.C. S.D. Calif. 1962) [R. 267-269].

Parens Patriae. The Court of Appeals affirmed. (Appendix B.)

Intervention under Rule 24(a)(2) F.R. Civ. P. depends upon a dual showing by the party seeking it that: (1) he is or may be inadequately represented *and* (2) that he would or might be bound by a judgment in the action.

The Court of Appeals held that the Board's counterclaim constituted "adequate representation" of petitioners' claims within the meaning of Rule 24(a). It held that, contrary to petitioners' contentions, the Board had statutory jurisdiction to assert liability of former directors and officers of an association to their association for breach of fiduciary duty and to obtain a money judgment for the association and its members, including actual damages, punitive damages and the imposition of a constructive trust. The Court denied petitioners' contentions that because the Board had not adopted any rules or regulations with respect to the fiduciary duty of former officers or directors of an association and that because the regulations and the Act did not grant to the Board any jurisdiction over the personal liability of former officers or directors, representation by the Board could not, as a matter of law, constitute "adequate representation" of petitioners' claims in their own right.

The Court also held that petitioners' assertion that the failure by the Board to publish any regulations governing the subject matter of petitioners' claims in any respect in the Federal Register pursuant to the Administrative Procedure Act and the Federal Register Act constituted a bar to the Board's assertion of this counterclaim was erroneous because

(a) The Administrative Procedure Act did not require the publication of common law rules of liability and did not require any publication that the Board intended, in its own name, to enforce such liability, or

(b) That if the Administrative Procedure Act or the Federal Register Act did require the publication of such rules in the Federal Register, that neither the Administrative Procedure Act nor the Federal Register Act were a bar to the enforcement of such rules because, as to such duties and liabilities, directors and officers are presumed to know the law.

I.

The Decision Below Is in Direct Conflict With the Decision of This Court in Kaufman v. Societe Internationale Pour Participations Industrieles et Commerciales, 343 U. S. 156, 96 L.Ed. 853, 72 S. Ct. 611, and Sam Fox Publishing Co., Inc. et al. v. United States, 366 U. S. 683, 6 L.Ed. 2d 604, 81 S. Ct. 1309.

The decision below holds that petitioners, who sought to intervene to protect their interest in a recovery against former officers or directors of their association for breach of fiduciary duty were not entitled to that intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure even though there is no dispute in the record that the association has taken an adverse position to petitioners as respects this claim, and petitioners will be bound by an adjudication in this action of the claim as between the association and those former directors and officers. In the *Kaufman* case, *supra*, this Court held expressly that minority stockholders of a corporation were entitled to intervene under Rule

24(a)(2) in an action brought by their corporation against an agency of the Government. In that case, this Court held that minority stockholders "may be bound" in an action in which their corporation is litigating the principal claim, but asserting a position adverse to the minority stockholders. Moreover, in the *Kaufman* case, this Court held that the presence in the litigation of a Government agency did not affect the right of the minority stockholders to intervene even though the Government agency there sought relief from which the minority stockholders could benefit financially at a later date.

In the *Sam Fox Publishing Co.* case, *supra,* this Court held that the right to a private judgment based on private claims and the right to a government judgment based on public claims were separate and distinct and that the adequacy or inadequacy of the representation of the government's claims could not decide the right of intervention of a private litigant under Rule 24(a)(2). In the instant case, petitioners are the real owners of their claim for a money judgment against respondent directors and officers of their association. Whether that claim be asserted by Petitioners in the name of the association or in their own behalf, the *Board* certainly has no *financial* interest in that judgment. Thus, insofar as the Board seeks a judgment of liability for money, which judgment will run to the association or its members, the Board's interest is not direct, financial, or equitable and is fundamentally distinct from petitioners' interest. The Board in this sense does not have an "interest" *of the same character and nature* as petitioners' interest and the Board *cannot*, for this reason alone, "adequately" represent petitioners' interest.

The opinion below is directly contrary to the rules for intervention as of right stated and applied by this Court in both the *Kaufman* case and the *Sam Fox Publishing Co.* case. Thus, the Court below erroneously refused intervention, contrary to *Kaufman, supra,* when it held that petitioners may not protect their financial interest which are adverse to the claims made by their association. Similarly, the Court below erroneously denied intervention contrary to the ruling in *Sam Fox Publishing, supra,* when it held that the issue of the right of intervention should be determined not upon the rule that private rights and Government rights are separate and distinct but that the private right of recovery and the Board's right of recovery are one and the same and one adequately represents the other.

Certiorari should be granted by this Court to review the decision below as in conflict with these decisions by this Court.

II.

The Court's Holding That the Board May Obtain Judicial Enforcement of a Rule Which It Has Never Adopted Is in Direct Conflict With the Decision of the Court of Appeals for the Third Circuit in Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings & Loan Association [CA 3 1960], 277 F. 2d 437.

The decision of the Court below in the instant case is in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings & Loan Association* (C. A. 3, 1960), 277 F. 2d 437. This conflict was not conceded in the decision below apparently because of a mistake made by the Court in its

reading of the decision in the *Greater Delaware Valley Federal Savings & Loan Association* case.

The issue in the *Greater Delaware Valley Federal Savings & Loan Association case, supra,* was whether the Federal Home Loan Bank Board under Section 5(d)(1) of the Home Owners Loan Act of 1933 could enjoin a federal savings and loan association from converting to a state association under that statute or under any of its other regulations. The Board contended that by reason of the broad and comprehensive powers which it possessed as respects the creation, existence and termination of a federal savings and loan association, that it had the basic discretion to approve or disapprove any conversion of a federal association to a state association. The Board also contended that violations by the associatiion of the proxy solicitation rules of the Securities Exchange Commission Act, Section 14(a) of the Securities Exchange Act of 1934, 15 U. S. C. A., Section 78(n)(a) and of the rules and regulations of the Securities Exchange Commission promulgated thereunder, gave the Board power to obtain an injunction against the conversion.

In the Trial Court, Judge Egan held:

(a) That the Board had no power to obtain a judgment *if its governing statute or its rules did not cover the subject matter.*

(b) *That the failure to publish rules and regulations pursuant to Section 3(a) of the Administrative Procedure Act, 60 Stat. 238 (1936), 5 U. S. C. A. Section 1002(a) (1952) precluded the Board from exercising any power over the subject matter.* In the Court of Appeals, Judge Hastie, for a unanimous court,

in afffirming Judge Egan, held that the Board could not obtain judicial enforcement of a rule which it had not adopted. Since the Board had never adopted any regulations requiring such general approval of all conversions, the Court could not grant the Board any relief. The Court did not reach the second argument, *i.e.*, the application of Section 3(a) of the Administrative Procedure Act. (277 F. 2d 437, 440)[3]

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[3]It was this issue, not the issue of the Board's power to enforce rules not adopted, as mistakenly stated in the decision below, that Judge Hastie refused to decide. The mistake in the opinion below on this point can be readily seen by comparison of the following two paragraphs: *Reich v. Webb* (336 F. 2d 153, 157),

> "Appellants read too narrowly. In support of their contention that the doctrine of EJUSDEM GENERIS limits the Bank Board's enforcement powers to those expressly covered by Congressional directives or Bank Board regulations, they cite *Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings & Loan Association*, 176 F. Supp. 24, 29 (D.C.E.D.Pa. 1959). In that case, the Bank Board sought a declaratory judgment voiding the conversion of a Federal Savings & Loan Association from a federal to a state charter until the approval of the Bank Board was obtained. No duty on the part of the Association to obtain Bank Board approval existed either at common law, by statute or by Bank Board regulations. In holding against the Bank Board in that case, the district court incorporated as part of its rationale an application of the doctrine of EJUSDEM GENERIS in the manner suggested by appellants. In affirming, the Third Circuit concluded that '* * * Board approval is not required by the statute * * *' and expressly declined to affirm on the ground urged here by appellants saying '* * * *[W]e do not reach this argument and express no opinion on it.' Federal Home Loan Bank Board v. Greater Delaware Valley Savings & Loan Association*, 277 F.2d 437, 440 (3d Cir. 1960) . . ." (emphasis added).

Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings & Loan Association (277 F. 2d 437, 440):

> "We have not overlooked a separate point made by the Association that the failure of the Board to publish any procedure for obtaining its approval of a desired conversion

In the Court below, the Board argued that Section 5(d)(1), as adopted in 1954, expressly gave to the Board the power to enforce "any other law", and that this power included enforcement of the common law and therefore permitted the Board, in the instant case, to obtain the same judgment against former directors of an association which petitioners could obtain for breach by those former directors of their fiduciary duties to petitioner and to the association. The language upon which the Board relied is: (12 U. S. C. Sec. 1464(d)(1))

> "The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in Paragraph 2 of this sub-section, the Board is authorized to act in its own name and through its own attorneys."

Petitioners contended that in the light of the legislative history of the adoption of amended 12 U. S. C. Section 1464(d)(1) in 1954 and in the light of the intention of Congress as disclosed from the entire statute, that the reference to "any other law" in the second sentence of 12 U. S. C. Sec. 1464(d)(1) referred to any other law or regulation which Congress has expressly directed the Board to enforce. Since Judge

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is a failure to comply with Section 3(a) of the Administrative Procedure Act, 5 U.S.C.A. § 1002(a), which relieves the Association of any obligation to obtain such approval. Cf. *Columbia Research Corp. v. Schaffer*, 2 Cir., 1958, 256 F.2d 677; *Pinkus v. Reilly*, D.C.N.J. 1957, 157 F. Supp. 548. *However, since we have concluded that Board approval is not required by the statute we do not reach this argument and express no opinion on it.*" (emphasis added).

Hastie, in *Greater Delaware Valley Savings and Loan Association supra,* expressly affirmed the Trial Court's decision holding that the Board had no power as respects subject matter not covered by its own regulations, it is clear that the decision below against petitioners is in direct conflict with that decision on the principal point in issue.

Moreover, the reasoning of the decision herein that the broad and comprehensive powers admittedly given to the Board extends even to give the Board jurisdiction in a subject area which is *not* included in the Act, and which the Board has *not* regulated, is precisely the same reasoning which was rejected by the Court of Appeals in the *Greater Delaware Valley Federal Savings & Loan Association* case, *supra.* In the instant case, the Court relied upon such decisions as *Porter v. Warner Holding Co.,* 328 U. S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946); *Phelps-Dodge Corp. v. National Labor Relations Board,* 313 U. S. 177, 61 S. Ct. 881, 85 L. Ed. 1271 (1941), and *Mitchell v. DeMario Jewelry Co.,* 361 U. S. 288, 80 S. Ct. 322, 4 L. Ed. 2d 323 (1960) to support the proposition that administrative enforcement of a statute is not limited to the *remedies* expressly provided when the remedy chosen is within contemplation of the enforcement powers granted by Congress. These cases each hold that where the power of regulation has been granted by Congress and the administrative agency *exercises that power by adopting regulations,* at least in the general area material to the complaint, that a federal court, in enforcing the agency's decision, will employ the full reach of the arm of a court of equity, including injunction, declaratory relief and even restitution. But the fundamental premise of each of these decisions is

that the agency *has* exercised the power by *adoption of regulations in the relevant area* and, that, there is, therefore, "jurisdiction" as respects that subject matter. None of these three foregoing decisions by the Court suggested that if the agency had *not* adopted regulations in the relevant subject matter area, that the agency could obtain a judgment imposing substantive liability on the basis of *other laws,* either substantive common law or substantive federal law. Moreover, there was no question in any of these cases that Congress intended that there be jurisdiction over the persons against whom judgment was sought.

In the instant case, neither the Home Owners Loan Act of 1933 nor the Board's regulations prohibit the acts which result in the claimed liability of the directors and officers of the association, and neither the act or the regulations provides for jurisdiction over these defendants. In this case, and for this reason, the *only* issue is lack of power in the Board over the subject matter of the claim and the parties, *not* the availability of an "auxiliary remedy" of a federal court of equity.

As applied to the facts of the instant case, it is respectfully submitted that the decision below is patently erroneous.

The Home Owners Loan Act of 1933, 48 Stat. 132, 12 U. S. C. A. Sec. 1461 *et seq.*, provides that:

> "The Board is authorized *under such rules and regulations as it may prescribe* to provide for the organization, incorporation, examination, operation and regulation of associations to be known as 'federal savings & loan associations'." (12 U. S. C. A. § 1464(a) (emphasis added).

Nothing in the remaining provisions of the Act itself expressly or by implication even touches the fiduciary duties of directors to the association.

Turning to the regulations, which appear in the Code of Federal Regulations, Title 12, Chapter V, Subchapter C, §§541-555, it is immediately evident that they contain no regulations whatsoever covering, expressly or by implication, the breach of fiduciary duty by a director who sells control of the association by sale of proxies and directorships for his own private benefit. Respondents have never contended that such provisions appeared in the regulations and the court's opinion below, except by reference to statements that the Board has exercised "broad powers of regulation" does not cite a single provision of the Act or regulations on this subject.

It is not surprising that there are no provisions of the Act or the regulations which cover such breaches of fiduciary duty by a director to an association, since under the Act, as under the federal statutes creating national banks, there are vast areas of duties and rights which are left to enforcement in the state courts under general law *National Bank v. Commonwealth,* 76 U. S. 353. Prather, Applicability of State Law and Federal Law to Federal Financial Institutions, U. S. Savings and Loan League, Legal Bulletin, 1954-55.

In 30 years of enforcement of the Act, prior to this case, the Board had never sued a director for breach of fiduciary duty and had never commenced an administrative proceeding against a director for breach of fiduciary duty.

Under the Act and the Board's regulations, it is clear that the Board has power to proceed, in any event, only against *associations in their corporate capacity.* The Board has no power to sue former directors of an association in their *individual* capacity.

The relevant provisions of the Act on this point are set forth at 12 U. S. C. A. 1464(d)(1). At every relevant point jurisdiction is given over the association in its corporate capacity only. Thus the hearing procedures are described as follows:

1. The adoption of a formal resolution stating an alleged violation of law or regulation with notice going to the *association.*

2. The *association* is given 30 days to correct the violation of law or regulation and to perform any legal duty.

3. If the *association* does not comply the Board sends the *association* 20 days written notice of the charges and a time and place for hearing.

4. The place of the hearing is the federal judicial district of the *association* unless it consents to another place. Appeals lie as provided by the Administrative Procedure Act.

5. Either the Board or the *association* have the option, after notice of the alleged violation, to apply to a United States District Court for the district where the *association* is located for a declaratory judgment, an injunction or other relief.

6. The Board may apply to the district court of the district where the *association* affected has its home office for the enforcement of any Board order.

7. The Board is made subject to suit by any *association.*

Thus the statute is clear that hearing procedures are between the Board and *association* only.

If this were not sufficient the Board's regulations concerning hearings relating to compliance with "law and regulations" adopted the same mechanics, *i.e.*, a hearing between the Board and the *association only*. Thus Section 542.3 of the regulations (12 C.F.R. Chapter V, sub-chapter C, Sec. 542.3) repeats the basic provision of 12 U. S. C. A. Section 1464(d)(1) and in every case the procedure is between the Board and the association only. There is even added a provision with respect to costs, "the costs of any hearing pursuant to the provisions hereof, as determined by the Board, may be assessed against the federal association party to such hearing unless it is found that such federal association was not guilty of the alleged violation of laws, regulations or duty."[4]

Finally, the legislative history of the adoption of Section 1464(d)(1), as amended in 1954, clearly demonstrates that Congress had no intention of permitting the Board to enforce the common law and statutory law of all of the States, and presumably the law as set forth in other Federal statutes under the ambiguous phrase "any other law". Prior to the adoption of that

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[4]Section 542.2 of the regulations (12 C.F.R. Chapter V, sub-chapter C, Section 542.2) permits application for hearing by any person "who has made an application or petition to the Board pursuant to any provision of parts 543, 544, 545 or 546 of this sub-chapter." Those sub-chapters are each admittedly irrelevant to any of the claims in this action. This section also provides that, "the board may order a hearing in connection with the consideration of any matters arising under any provision of the rules and regulations of this sub-chapter, whether or not any request therefor has been made by any person." Since, as noted above, the Board has not adopted any regulations covering the claims in this action expressly or by implication, this provision is irrelevant.

Statute, the Board's only means of regulation was the appointment of a receiver or conservator. When a receiver or conservator was appointed under the then existing law (and that provision still continues) the receiver or conservator was expressly permitted to exercise all of the rights of the association and its members. In 1954 when the present language of Section 1464(d)(1) was adopted, it was stated to be for the express purpose of providing, in the first instance, for a less drastic means of enforcement of the Act than the appointment of a receiver or conservator. The means adopted were notice of an administrative hearing under the Administrative Procedure Act, or an alternative suit for declaratory relief. It was in this procedural context, *i.e.*, to provide the regulatory details for the administrative hearing or the instituting of declaratory relief action that Congress provided in the first sentence of Section 1464(d)(1) that "the Board shall have power to enforce this section and the rules and regulations made hereunder." Had Congress desired to use this procedural section to expand the Board's power to include enforcement of the common law, or other statutes, the language of that first sentence need only have read, "The Board shall have power to enforce this section, any rules and regulations made hereunder, and any other law or regulation." This Congress did not do. Instead, it added the present second sentence of Section 1464(d)(1) which, although admittedly ambiguous, as a matter of logic and common sense, requires that the procedural language therein be confined to the enforcement of other laws which Congress has directed the Board to enforce.[5]

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[5]The assertion in the Court's opinion below that unless the language "any other law" was construed to authorize the Board to enforce the common law and to enforce laws other than those

III.

The Decision Below That the Provisions of the Administrative Procedure Act and the Federal Register Act Requiring Publication in the Federal Register of Substantive Rules Does Not Prohibit Enforcement by an Administrative Agency of Unpublished Rules of Liability Is in Direct Conflict With Decisions in the District of Columbia Circuit, and in the Second, Third, Fourth and Fifth Circuits.

The Court below held that unpublished rules were enforceable, despite the provisions of the Administrative Procedure Act and the Federal Register Act if notice of those rules could be presumed under the general principle that "one is presumed to know the law".[6] The holding

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directed to be enforced by Congress, that therefore this language would be "merely surplusage" is, with deference, erroneous. The 1954 Amendment authorized the Board to enforce the rules and regulations which it in fact adopted under *Section 1461 of the Act* in its own name and through its own attorneys, a power which, as of 1954, was not expressed in the Act anywhere. But it is a drastic and completely unwarranted interpretation of the language of that amendment to contend that Congress, with these three words, thereby gave the Board carte blanche authority to enforce the common law, the statutory law and administrative law of all 50 states and the United States against the officers, directors or members of a federal savings and loan association.

[6]As a preliminary matter, the Court suggested that a rule whereby the Board would assert that it could recover a money judgment against former directors or officers of an association who had breached their fiduciary duty to the association and its members by selling control of the association, including proxies and directorships for their own private benefit, was not a "substantive rule" within the meaning of Section 3 of the Administrative Procedure Act and therefore was not required to be published under that Act or under the Federal Register Act. But the definition of the term "rule" is expressly provided in Section 2 of the Administrative Procedure Act, and it is stated to mean "the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy . . ." That definition does not permit an exception to the requirements for publishing

that presumptive knowledge of a rule of liability is sufficient to satisfy the specific requirements of the Administrative Procedure Act and the Federal Register Act for publication in the Federal Register is in conflict with the decision in *Graham v. Lawrimore* (DC ED SC 1960), 185 F. Supp. 761, affirmed, *Graham v. Lawrimore* (C. A. 4, 1961), 287 F. 2d 207. In the *Graham* case, the Court held that a document which had not been published pursuant to the Administrative Procedure Act and the Federal Register Act was void and unenforceable. The Court said:

> "While the Administrative Procedure Act (5 U.S.C.A. § 1003) and the Federal Register Act (44 U.S.C.A. § 307) are set up in terms of making information available to the public, the acts are more than mere recording statutes whose function is solely to give constructive notice to persons who do not have actual notice of certain agency rules. The Acts set up the procedure which must be followed in order for agency rulings to be given the force of law. Unless the prescribed procedures are complied with, the agency or administrative rule has not been legally issued, and consequently it is ineffective. The administrative handbook referred to by plaintiff was not published in the Federal Register. Hence the handbook is not tantamount to regulations published in the Federal Register, and the handbook does not have the force and effect of law. *Hotch v. United States,* 9 Cir., 212 F.2d 280,

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"substantive rules" upon the grounds, as stated by the Court, that the rule "involves long standing, clearly defined and well known duties". The gap that would be created by that exception would be so immense as to obliterate the "publication" requirements of the Administrative Procedure Act.

283-284, 14 Alaska 594; *United States v. Morelock*, D.C.D. Md., 124 F. Supp. 932, 944; *Hawkins v. State Agriculture Stabilization and Conservation Committee*, D.C.D. Tex., 149 F. Supp. 681, 687-688, affirmed 5 Cir., 252 F.2d 570."

Affirmed, 287 F. 2d 207.

The decision below is also in conflict with the decision in *Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings & Loan Association* (DC ED PA, 1959), 176 F. Supp. 24, affirmed, *Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings & Loan Association* (C. A. 3, 1960), 277 F. 2d 437, 440. In the *Greater Delaware Valley* case, *supra*, the Federal Home Loan Bank Board sought to enjoin the conversion of a federal association to a state association. The Board asserted that it had jurisdiction to act and the right to obtain an injunction upon two grounds:

(a) Its comprehensive regulatory powers included the discretionary power to give or withhold its consent to all conversions;

(b) That the association had mailed proxy solicitation information to the members of the association who voted on the conversion, which proxy solicitation statements were in violation of Section 14(a) of the Securities & Exchange Act of 1934, 15 U.S.C. Section 78(n)(a) and the rules and regulations of the Securities Exchange Commission promulgated thereunder.

The Court held:

"The Board's insistence, however, upon its right of approval indicates that what it is really seeking is

> a discretionary power to give or withhold its consent in all cases of Federal to State conversion. Since it has failed to adopt or promulgate rules and regulations on this subject, were we of the opinion that it had the power of approval, we would be inclined to decide that it cannot assert this power in this particular case because of its failure to publish rules and regulations on the subject as required by Section 3(a) of the Administrative Procedure Act, 60 Stat. 238 (1946), 5 U.S.C.A. § 1002(a) (1952); *Pinkus v. Reilly,* D.C.D.N.Y. 1957, 157 F. Supp. 548, 551, and opinion of Judge Kraft, of this district in *Low v. Thomas,* D.C. 1958, 163 F. Supp. 945, 946, and cases there cited."
> Judgment affirmed, 277 F. 2d 437.

The decision below is also in conflict with the decision in *Gonzales v. Freeman,* (DC Cir. 1964), 334 F. 2d 570. In the *Gonzales* case, the Secretary of Agriculture asserted the power to refuse to permit defendant to do business with the Commodity Credit Corporation because of prior improper activities of the defendant, including a criminal conviction as respects dealings with the Commodity Credit Corporation. The Secretary of Agriculture had never published any provisions pertaining to such debarment from dealing with the Commodity Credit Corporation. The Court held that the failure to comply with the Administrative Procedure Act made such a debarment rule unenforceable. The Court said:

> "No regulations have been established by appellees authorizing or governing debarment for misuse of official inspection certificates relating to the commodities exported by appellants to Brazil.

Section 3(a) of the Administrative Procedure Act provides:

'(a) Every agency shall separately state and currently publish in the Federal Register * * * (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

'(b) Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.' 60 Stat. 238 (1946), 5 U. S. C. § 1002(a), (b) (1958).

The command of the Administrative Procedure Act is not a mere formality. Those who are called upon by the government for a countless variety of goods and services are entitled to have notice of the standards and procedures which regulate these relationships. Neither appellants nor others similarly situated can turn to any official source for guidance as to what acts will precipitate a complaint of

misconduct, how charges will be made, met or refuted, and what consequences will flow from misconduct if found. In the contractual relationship shown by this record an experienced businessman could reasonably anticipate that some agency action might well be taken as a result of misuse of inspection certificates, *but he could only speculate as to the nature of the action and the processes by which it would be effected. This condition does not accord with the provisions of the Administrative Procedure Act.*" (emphasis added) (334 F. 2d 570, 578).

If actual or presumed notice overcomes the requirement for publication in the Federal Register under the Administrative Procedure Act and the Federal Register Act, then most serious questions are raised as to one of the most significant purposes of the adoption of the Administrative Procedure Act as respects the rule making function. Such rule-making anticipates that *prior* to publication, interested parties will be given the opportunity to submit their views. This was expressly stated in the report of the House of Representatives Committee on the Judiciary when it reported to the Congress concerning the substance of the Administrative Procedure Act:

> "In the 'rule making' (that is, 'legislative') function it [the Adminstratve Procedure Act] provides that with certain exceptions agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration *before the issuance of general regulations* (sec. [italics ours].) U. S. Code Congressional Service, 79th Congress, Second Session, 1949, pp. 1195, at 1205."

The report goes on to state that hearings need not be held on a proposed regulation unless required by statute. But the important disclosure is that publication is a prerequisite to the issuance of a regulation.

The Congressional directive in regard to the procedure to be followed in the issuance of agency regulations must be strictly complied with, since the issuance of regulations is in effect an exercise of delegated legislative power.

If an agency can enforce rules which it does not adopt or publish upon the grounds of actual or presumed notice of those rules, then one of the strongest motivations for pre-adoption publication is completely subverted.

The Court below recognized that its decision was in conflict with the rule that requires publication in the Federal Register as a condition of enforcement by an Administrative Agency. Thus, the Court noted in its opinion that in this respect it was even in conflict with the prior decision of the Court of Appeals for the Ninth Circuit. *Hotch v. United States* (1954), 212 F. 2d 280.[7]

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[7]See also the following decisions in conflict with the case at bar:

Willis A. Hawkins, et al. v. State Agricultural Stabilization and Conservation Committee, et al. (D.C. S.D. Texas 1957), 149 F. Supp. 681, holding that a document not published in the Federal Register did not have the status of a regulation.

Affirmed:

Willis A. Hawkins, et al. v. State Agricultural Stabilization and Conservation Committee, et al. (C. A. 5, 1958), 252 F. 2d 570;

Columbia Research Corporation, et al. v. Robert H. Schaffer (C. A. 2d 1958), 256 F. 2d 677;

Vibra Brush Corp. v. Schaffer (C. A. 2d 1958), 256 F. 2d 681;

Pincus v. Reilly (D.C. N.J. 1957), 157 F. Supp. 548).

Conclusion.

The questions presented herein are indeed of substantial importance in each of the three statutory areas encompassed by the decision of the Court below.

It is particularly important that the rules for intervention under 24(a) of the Federal Rules marked out by this Court's decisions in *Kaufman* and *Sam Fox Publishing Co.* be clarified and strengthened.

With respect to the administration of the Home Owners Loan Act of 1933, it is of great significance that this Court determine whether or not the Federal Home Loan Bank Board is now empowered under Rule 5(d)(1) of the Act to enforce common law liability as well as liabilities arising under any other law of the several States of the United States.

Finally, it is extremely important to the administration of the Administrative Procedure Act and the Federal Register Act that the bar, the Courts and the regulated public know whether or not the presumption that a litigant knows the law eliminates the requirements of those acts that all substantive rules and regulations be published.

Wherefore, petitioners pray that their Petition for Certiorari be granted.

JACK CORINBLIT,

By JACK CORINBLIT,

Attorney for Petitioners.

VAUGHAN, BRANDLIN,
ROBINSON & ROEMER,
Of Counsel.

APPENDIX A.

Rule 24(a) of the Federal Rules of Civil Procedure.

"RULE 24. INTERVENTION.

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

Section 5(a) of the Home Owners Loan Act of 1933, 48 Stat. 132, 12 U.S.C. Section 1464(a).

"§ 1464. FEDERAL SAVINGS AND LOAN ASSOCIATIONS — ORGANIZATIONS AUTHORIZED

(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

1954 Amendment of the Home Owners Loan Act of 1933, Act of August 2, 1954, Section 503(2), 68 Stats. 622, 634, 12 U.S.C. Section 1464(d)(1).

"(d)(1) The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in paragraph (2) of this subsection, the Board is authorized to act in its own name and through its own attorneys. The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territorities or possessions or the Commonwealth of Puerto Rico. It shall by formal resolution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representative in Charge, a conservator or a receiver shall be exclusively as provided in paragraph (2) of this subsection. Such association shall have thirty days within which to correct the alleged violation of law or regulation and to perform any legal duty. If the association concerned does not comply with the law or regulation within such period, then the Board shall give such association twenty days' written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such alleged violation of duty. Such hearing shall be in the Federal judicial district of the association unless it consents to another place and shall be conducted by a hearing examiner as is provided by the Administrative Procedure Act. The Board or

any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have power to issue subpenas and subpenas duces tecum, and shall issue such at the request of any interest party, and the Board or any interested party may apply to the United States district court of the district where such hearing is designated for the enforcement of such subpena or subpena duces tecum and such courts shall have power to order and require compliance therewith. A record shall be made of such hearing and any interested party shall be entitled to a copy of such record to be furnished by the Board at its reasonable cost. After such hearing and adjudication by the Board, appeals shall lie as is provided by the Administrative Procedure Act, and the review by the court shall be upon the weight of the evidence. Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. The Board may apply to the United States district court of the district where the association affected has its home office for the enforcement of any order of the Board and such court shall have power to enforce any such order which has become final. The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the

United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, to the Federal Home Loan Bank Board, Washington, District of Columbia." Code of Federal Regulations, Title 12, Chapter V, Subchapter C, Section 542.3.

"§542.3 HEARINGS; COMPLIANCE WITH LAWS AND REGULATIONS. If, in the opinion of the Board, a Federal association is in violation of any law or regulation to which it is subject, the Board in any proceeding under the provisions of Section 5(d)(1) of the Home Owners' Loan Act of 1933, as amended, shall, by formal resolution, state the alleged violation of law or regulation and give written notice to such Federal association of the facts alleged to be such violation, addressed to its home office. Such notice shall contain a statement that it is a formal notice issued pursuant to this section. In the event the Federal association does not correct such violation of law or regulation or perform such legal duty as it may be required to perform within 30 days after the date it shall have been served with such notice, the Board shall give such Federal association 20 days' written notice of the charges against it and of the date on which the Board will conduct a hearing as to such alleged violation or failure to perform. Unless the Federal association consents to another place, the hearing shall be held in the Federal judicial district in which the home office of such association is located. Such hearing shall

be conducted in accordance with the pertient provisions of Part 509 of this chapter. The cost of any hearing pursuant to the provisions hereof, as determined by the Board, may be assessed against the Federal association party to such hearing unless it is found, that such Federal association was not guilty of any of the alleged violations of law, regulation or duty."

Sections 3 and 4 of the Administrative Procedure Act, 60 Stat 238, 5 U. S. C. Section 1002(a) and 5 U. S. C. Section 1003(a).

"§ 1002. PUBLICATION OF INFORMATION, RULES, OPINIONS, ORDERS AND PUBLIC RECORDS.

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency

for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

"§1003. RULE MAKING

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

NOTICE; PUBLICATION AND CONTENTS

(a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

Section 5 and Section 7 of the Federal Register Act, 49 Stats. 501 and 502, 44 U. S. C. Sections 305(a) and 307.

"§305. DOCUMENTS TO BE PUBLISHED IN FEDERAL REGISTER — PROCLAMATIONS AND EXECUTIVE ORDERS; DOCUMENTS HAVING GENERAL APPLICABILITY AND LEGAL EFFECT; DOCUMENTS REQUIRED TO BE PUBLISHED BY CONGRESS

(a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so as to be published by Act of the Congress: PROVIDED, That for the purposes of this chapter every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect."

"§307. FILING DOCUMENT AS CONSTRUCTIVE NOTICE; PUBLICATION IN REGISTER AS PRESUMPTION OF VALIDITY; JUDICIAL NOTICE; CITATION

No document required under section 305(a) of this title to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with

the Division and a copy made available for public inspection as provided in section 302 of this title; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 305 of this title, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number. (July 26, 1935, c. 417, § 7, 49 Stat. 502.)"

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Bernard Reich and Sylvia Reich, Depositors and members of the Beverly Hills Federal Savings and Loan Association, individually and in behalf of Beverly Hills Federal Savings and Loan Association and the other members of said association similarly situated, Appellants, vs. Eugene Webb, Jr., Marguerite Webb, Richards Matthews, Jr., Robert Rufi, Eugene C. Jones, Lytton Financial Corporation, Bart Lytton, Beth Lytton, Thomas W. Clarke, Dr. Samuel J. Sills, Glenn Wilson, H. P. Braman, and Federal Home Loan Bank Board, Appellees. No. 18,457.

[August 18, 1964]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes, Merrill and Koelsch, Circuit Judges Koelsch, Circuit Judge.

The narrow question before us on this appeal is whether the district court properly refused appellant's motion to intervene as a matter of right pursuant to Rule 24(a)(2) or (3) F.R. Civ. P. The answer depends upon whether the Federal Home Loan Bank Board has the power to enforce by court action common law fiduciary responsibilities of savings and loan association officers and directors. For reasons hereafter appearing, we conclude that the order of the district court was correct.

The facts are undisputed. Appellants are depositors and members of the Beverly Hills Federal Savings and Loan Association. By various court actions they have challenged the transfer of controlling interest in the Association from a combine headed by Eugene and Marguerite Webb (the Webb group) to one headed by Bart and Beth Lytton (the Lytton group). Appellants allege that the Webb group has personally profited in connection with the transfer of proxies, directorships and control of the Association to the Lytton group; their theory is that these personal profits derived from "sale of office" and "sale of control" and as such belong to the entire Association because of an alleged breach of fiduciary duty. They contend that they, as depositors and members of the Association, may assert the claim on its behalf in a derivative action.

The present dispute arose when the Federal Home Loan Bank Board (Bank Board), a body charged by Congress with the supervision and regulation of federal savings and loan associations, instituted administrative proceedings challenging the same transactions attacked by appellants. These proceedings were terminated when the Association filed a suit against the Bank Board, pursuant to § 5(d)(1) of the Home Owner's Loan Act of 1933, as amended [12 U.S.C. §1464(d)(1)], to have the validity of the challenged transaction judicially determined and to obtain an injunction staying further Bank Board proceedings. The Association later amended its complaint, impleading members of the Webb and Lytton groups.

At this juncture, appellants moved to intervene in the action as parties plaintiff under Rule 24(a) F.R. Civ.

P.[1] They urged that their interests as depositors in the Association would not be adequately represented by the Association because of alleged domination by the Lytton group. They further asserted that the Bank Board could not adequately represent them for the reason that it lacked power to enforce the fiduciary obligations of the Association directors and officers by court action. In either event they claimed they would or might be bound by the result. As an independent ground supporting intervention as a matter of right, appellants contended they might be adversely affected by a distribution or other disposition of property, subject to the control or disposition of the court. The Association, the Webb group, the Lytton group and the Bank Board all opposed the proposed intervention. Following a hearing, appellants' motion was denied but they were granted leave to file briefs as *amicus curiae*.

The district court rested its decision[2] on a determination that the Bank Board had power to adequately represent appellants. Alternative and independent bases for this power were found: (1) In Congressional authorization [12 U.S.C. § 1464(d)(1) and (2)]; (2)

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[1]Insofar as relied upon by appellants, Rule 25 provides:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof. As amended Dec. 27, 1946, eff. March 19, 1948."

The appellants also moved below for permissive intervention under subdivision (b) of Rule 24, but no appeal has been taken from that part of the district court's order.

[2]Beverly Hills Federal Savings and Loan Association v. Federal Home Loan Bank Board, 33 F.R.D. 292 (D.C. S.D. Calif. 1962).

inherent in the Bank Board by virtue of the doctrine of *Parens Patriae.*

Appellants assert error and appeal. Jurisdiction to review an order denying intervention as a matter of right lies in this court. 28 U.S.C. §§ 1291, 1294; *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co., et al.,* 331 U.S. 519, 524 (1947).

Intervention under Rule 24(a)(2) F.R. Civ. P. depends upon a dual showing by the party seeking it that: (1) he is or may be inadequately represented *and* (2) that he would or might be bound by a judgment in the action. *Farmland Irrigation Co. v. Dopplmaier,* 220 F.2d 247, 248 (9th Cir. 1955). The Supreme Court,[3] as well as commentators,[4] have perceived the inherent dilemma confronting would-be intervenors in class suits under this branch of Rule 24. As applicable here it would mean that if, as appellants assert, the Bank Board lacks the power to represent them, then they would "not be bound" by operation of the doctrine of *res judicata. Sutphen, Inc. v. United States,* 342 U.S. 19, 21 (1951); *Formulabs, Inc. v. Hartley Pen Co.,* 275 F.2d 52, 55 (9th Cir. 1960); if, on the other hand, the Bank Board possesses the necessary power, appellants may not intervene as a matter of right because they are "adequately represented." But we need not saddle appellants on the horns of this dilemma to refute their right to intervene. For we conclude that the Bank Board has power by virtue of 12 U.S.C. § 1464(d)(1)

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[3]Sam Fox Publishing Co. v. United States, 366 U.S. 683, 691 (1961).

[4]WRIGHT, FEDERAL COURTS § 75 at 284; Note, Intervention of Right in Class Actions: The Dilemma of Federal Rule of Civil Procedure 24(a)(2) 50 Calif L. Rev. 89 (1962); Anno. 84 ALR 2d 1412, 1433 (1962).

to secure all relief sought by appellants,[5] and therefore they are "adequately represented" so as to preclude intervention as a matter of right under Rule 24(a)(2) F.R. Civ. P.

The Federal Home Loan Bank Board is an administrative body created by Act of Congress. Its powers are broadly declared in several sections of the Act, one of which is 12 U.S.C. § 1464 (d)(1). So far as pertinent, that section provides:

> "The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, *or any other law or regulation,* and in the administration of conservatorships and receiverships as provided in paragraph (2) of this subsection, the Board is authorized to act in its own name and through its own attorneys." (Emphasis supplied).

Authority to apply to the district court for the enforcement of these provisions is then conferred:

> "Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders."

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[5]As the district court noted, Beverly Hills Federal Savings and Loan Association v. Federal Home Loan Bank Board, supra, 33 F.R.D. at 293, examination of the relief sought by the Bank Board and appellants reveals it to be substantially similar.

Appellants first urge that "[t]he term 'or any other law or regulation' in the procedural provisions of § 5(d)(1) [12 U.S.C. 1464(d)(1)] obviously must be construed in the light of the doctrine of *ejusdem generis*." They contend that:

> "[u]nder this doctrine that term must necessarily refer to 'any other law or regulation' which Congress has expressly directed the Board to enforce and which covers the same subject matter as is contained in the statute and regulations of the Board. But [they note that] there is no contention that Congress has expressly directed the Board to enforce liability of directors for the breach of their fiduciary duties to members and the Board has not in 30 years of administering the Act ever adopted any regulations on that subject."

They conclude ". . . this provision . . . is not relevant here."

Appellants read too narrowly. In support of their contention that the doctrine of *ejusdem generis* limits the Bank Board's enforcement powers to those expressly covered by Congressional directives or Bank Board regulations, they cite *Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings & Loan Association*, 176 F. Supp. 24, 29 (D.C. E.D. Pa. 1959). In that case the Bank Board sought a declaratory judgment voiding the conversion of a Federal Savings and Loan Association from a federal to a state charter until the approval of the Bank Board was obtained. No duty on the part of the Association to

obtain Bank Board approval existed either at common law, by statute or by Bank Board regulations. In holding against the Bank Board in that case, the district court incorporated as part of its rationale an application of the doctrine of *ejusdem generis* in the manner suggested by appellants. In affirming, the Third Circuit concluded that ". . . Board approval is not required by the statute . . ." and expressly declined to affirm on the ground urged here by appellants, saying ". . . [W]e do not reach this argument and express no opinion on it." *Federal Home Loan Bank Board v. Greater Delaware Valley Savings & Loan Association,* 277 F.2d 437, 440 (3d Cir. 1960). Basically the holding stands for nothing more than a declaration that substantive liability cannot be created by the Bank Board apart from statute, a proposition with which we fully agree.

Here, however, are several considerations pointing to a broad construction of the Bank Board's power to secure legal redress under 12 U.S.C. § 1464(d)(1). Absent is the necessity of a narrowing construction so as to sustain constitutionality. And in cases involving conflict between rules of construction, the courts will strive to adopt that construction which best effectuates the legislative purpose. *Matheson v. Armbrust,* 284 F. 2d 670, 674 (9th Cir. 1960). As this court noted in *Home Loan Bank Board v. Mallonee,* 196 F.2d 336, 390 (9th Cir. 1952), "The Home Owner's Loan Act of 1933, as amended, gives the Board a wide area of

supervisory control over [Savings and Loan Associations] and its extensive powers in this field were given the strongest emphasis in *Fahey v. Mallonee,* [332 U.S. 245 (1947)]." In discussing the extent of authority conferred on the Bank Board by Congress, the Fifth Circuit has observed that:

> "[w]hen a governmental agency holds such great powers over its offspring, even to the point of appointing a conservator or receiver to replace the management, 12 U.S.C.A. Sec. 1464(d)(2), it is difficult to hold that an informal request, even demand, to clean house would amount to an abuse of the statutory powers and discretion of the agency." *Miami Beach Federal Savings & Loan Association v. Callander,* 256 F.2d 410, 414-415 (5th Cir. 1958).

Construing the statute as a whole and in light of its purpose [*Worcester Felt Pad Corp. v. Tucson Airport Authority,* 233 F.2d 44, 48 (9th Cir. 1956)] it is manifest that Congress envisioned a strong Bank Board with broad regulatory power to redeem and make viable the initial condition of charter issuance that "primary consideration [be given] to the best practices of local mutual thrift and home-financing institutions in the United States," *California v. Coast Federal Savings & Loan Association,* 98 F. Supp. 311, 316 (D.C. S.D. Calif. 1951). We are mindful of the cardinal principle

> ": . . . that in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the

performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be but never to be encouraged or aided by the other in the attainment of the common aim." *United States v. Morgan,* 307 U.S. 183, 191 (1939).

"[T]here is little scope for the ancient shibboleth that a statute in derogation of the common law must be strictly construed, or for placing an emphasis on their particulars which will defeat their obvious purpose. Legislatures create administrative agencies with the desire and expectation that they will perform efficiently the tasks committed to them. That, at least, is one of the contemplated social advantages to be weighed in resolving doubtful construction." STONE, *The Common Law in the United States,* 50 Harv. L. Rev. 4, 19, (1936).

Accordingly, it has been held that administrative enforcement of a statute is not limited to the remedies expressly provided when the remedy chosen is within the contemplation of the enforcement powers granted by Congress. *Phelps Dodge Corp. v. National Labor*

Relations Board, 313 U.S. 177 (1941). Likewise, when an administrative agency involves the jurisdiction of the court to redress acts and practices made illegal, broad latitude in fashioning appropriate relief is permissible.

> "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this court long ago recognized 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.'" *Mitchell v. DeMario Jewelry,* 361 U.S. 288, 291-292 (1960).

Only a clear expression of legislative intent will limit an equity court's power in this regard. *Porter v. Warner Holding Co.,* 328 U.S. 395, 398 (1946). We therefore conclude that, in view of the considerations above noted, the language in 12 U.S.C. § 1464(d)(1) "or any other law" includes common law fiduciary responsibilities which the Bank Board is empowered to enforce through appropriate court action. To hold otherwise would render the language "or any other law" mere surplusage. As the Supreme Court said in construing a penal statute, where narrow construction is a requirement,

> "The rule of *ejusdem generis,* while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation." United States v. Alpers, 338 U.S. 680, 683 (1950).

We are clear that a narrow and inhibited construction would be neither good policy nor good law. Compare *Los Angeles Trust Deed & Mortgage Exchange v. Securities & Exchange Commission*, 285 F.2d 162 (9th Cir. 1960). Our disposition on this ground makes it unnecessary to decide whether the sovereign power of *parens patriae* vests in a statutory agency and we therefore decline appellees' invitation to so determine.

As for appellants' contention that to allow the Bank Board to enforce common law fiduciary duties by court action would be to permit noncompliance with the Administrative Procedure Act, the short answer is that those duties do not fall within the publicity and notice requirements of the APA.[6] We believe the sense of

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[6] 5 U.S.C. § 1002(a)(3) provides:

"§ 1002. *Publication of information, rules, opinions, orders and public records*

(a) Every agency shall separately state and currently publish in the Federal Register (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

5 U.S.C. § 1003(a)(3) provides:

"§ 1003. *Rule making* Notice; publication and contents

(a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

those sections indicates they were not intended to apply to court enforcement of obligations imposed at common law, even though the court action is initiated by administrative agencies. Nothing in the legislative history suggests otherwise. See *Administrative Procedure Act, Legislative History,* Senate Document 248, 79th Cong. 2d Sess., and material cited at pages 426-428 of the Index. Rather, it appears that the publicity and notice sections were designed to meet the very real need for public information on the detailed agency rules and regulations which, though authorized by statute, often impose technical requirements far beyond those existing at common law. See 1 DAVIS, ADMINISTRATIVE LAW § 6.09 at p. 392-394. Here, on the other hand, there is no trap for the unwary; for the action is primarily judicial and involves long standing, clearly defined and well known duties. In these circumstances, no injustice results, for one is "presumed to know the law."[7]

Appellants' alternative claim for intervention as a matter of right by virtue of Rule 24(a)(3) F.R. Civ. P. is also untenable. Inasmuch as the purpose underlying Rule 24(a)(3) is ". . . to prevent the multiplicity of suits where common questions of law or fact are involved" [*Fusae Yamamoto v. Dulles,* 16 F.R.D. 195,

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[7]It would therefore seem (even if it be assumed that the common law duties here in issue are *within* the purview of the APA) that those duties fall within an exception to the publicity requirements contemplated by § 4(a) of the APA:

"General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) . . ." But see: Hotch v. United States, 212 F.2d 280, 283 (9th Cir. 1954); Compare criticism by Professor Davis, 1 Davis, Administrative Law, § 6.10.

198 (D.C. Hawaii 1959)] and giving particular cognizance to our conclusion that appellants are "adequately represented" by a disinterested governmental agency, and the fact that appellants' interests are derivative, not primary, we conclude the circumstances of this case do not warrant intervention under that rule. See *Kaufman v. Societe Internationale*, 188 F.2d 1017 (D.C. Cir. 1951); Rev'd on other grounds, 342 U.S. 156. Compare *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir. 1953) where intervention under Rule 24(a) was granted a small shareholder when there were allegations that the suit was not being "diligently prosecuted." See also *United States v. Loew's, Inc.*, 20 F.R.D. 423, 425 (D.C. S.D. N.Y. 1957) and cases there cited.

The judgment is affirmed.